Morgan's Holiday Markets, Inc., and its alter ego, North State Grocery, Inc. *and* United Food and Commercial Workers, Local 588, United Food and Commercial Workers International Union, AFL–CIO. Cases 20–CA–23314 and 20–CA–25025

April 5, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On December 1, 1995, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondents filed joint cross-exceptions, and a brief in support. The Respondents also filed a joint answer to the General Counsel's and Charging Party's exceptions. The General Counsel filed a brief in opposition to the Respondents' cross-exceptions, and the Charging Party filed both an answering brief and a reply brief to the Respondents' cross-exceptions. The Respondents filed a joint reply brief to the General Counsel's opposition and the Charging Party's answer to its cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

To date, the litigation in this alter ego case has concerned only a preliminary procedural issue, whether the General Counsel's reinstatement of the dismissed charge in Case 25–CA–23314 was proper under the fraudulent concealment exception to Section 10(b) of the Act.[1] The judge concluded that the charge cannot be reinstated because the facts concealed were not "material." Accordingly, she dismissed the complaint on the ground that it was barred by Section 10(b). Although we agree with the judge's conclusion, we find that this case presents the Board with an appropriate opportunity to clarify the standard it uses to determine whether the "materiality" element of the fraudulent concealment doctrine has been met.

BACKGROUND

As the judge recognized, the basis for the Board's fraudulent concealment exception to Section 10(b) is the equitable doctrine set forth in *Holmberg v. Armbrecht.*[2] Under the *Holmberg* doctrine, if a party "has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered.'"[3]

In 1985, the Board adopted the rule that "a dismissed charge may not be reinstated outside the 6-month limitations period of Section 10(b) absent special circumstances in which a respondent fraudulently conceals the operative facts underlying the alleged violation." *Ducane Heating Corp.*[4] More recently, the Board applied this doctrine in litigation involving Brown & Sharpe Manufacturing Company where the issue was whether Brown & Sharpe had engaged in fraudulent concealment of documents regarding its bargaining strategy so as to warrant reinstatement of a surface bargaining charge which the General Counsel had originally dismissed. In *Brown & Sharpe I,*[5] the Board dismissed the complaint on Section 10(b) grounds, finding that the facts that were alleged to have been fraudulently concealed were not "operative facts."[6]

In 1991, the District of Columbia Circuit Court of Appeals reversed,[7] stating that the Board had failed to adequately explain the "operative facts" standard and remanded the case to the Board "for resolution of the fraudulent concealment issue."[8]

On remand (*Brown & Sharpe II),*[9] the Board announced that it was abandoning the "operative facts"

[1] Sec. 10(b) provides that no complaint shall issue based on an unfair labor practice occurring more than 6 months prior to the filing of the unfair labor practice charge.

[2] 327 U.S. 392 (1946). In addition, the judge found that the doctrine of "self-concealing" fraud is not applicable here. In *Brown & Sharpe Mfg. Co. (Brown & Sharpe II)*, 312 NLRB 444 (1993), the Board stated that, by embracing the standard for fraudulent concealment in *Holmberg v. Armbrecht*, "we do not necessarily adopt all the glosses on the fraudulent concealment doctrine set forth by various Federal courts." 312 NLRB 444 fn. 5. *Brown & Sharpe II* cited *Teamsters Local 170 v. NLRB*, 993 F.2d 990 (1st Cir. 1993), in which the court noted that Board holdings have not followed Federal cases allowing a finding of fraudulent concealment on the basis of a "self-concealing scheme" as opposed to independent affirmative acts of concealment. Even in *O'Neill Ltd.*, 288 NLRB 1354 (1988), enfd. 965 F.2d 1522 (9th Cir. 1992), cert. denied 509 U.S. 904 (1993), relied on by the General Counsel and the Charging Party in their exceptions, the Board relied on an affirmative act: the attorneys' affirmative misrepresentation of material facts, to find fraudulent concealment. As the instant case involves affirmative acts of concealment, we find that the issue of whether the Board should adopt the "self-concealing fraud" doctrine and, if adopted, what is meant by such fraud is more properly left to another case. Accordingly, we do not pass on the judge's statements regarding what constitutes "self-concealing fraud."

[3] 327 U.S. at 397.

[4] 273 NLRB 1389.

[5] 299 NLRB 586 (1990).

[6] Id.

[7] *District Lodge 64, IAM v. NLRB*, 949 F.2d 441 (1991).

[8] Id. at 449–450.

[9] 312 NLRB 444 (1993).

standard and instead would require that the allegedly concealed evidence constitute "material facts" in accordance with the test enunciated by the D.C. Circuit in *Fitzgerald v. Seamans,*[10] which it summarized as follows:

> [Fraudulent concealment] has three critical requirements: (1) deliberate concealment has occurred; (2) material facts were the object of the concealment; and (3) the injured party was ignorant of those facts, without any fault or want of due diligence on its part.[11]

Specifically, addressing the second element, the Board formulated the materiality test as follows:

> concealed evidence is "material" if it would make a critical difference between establishing a violation and not doing so. Thus, if the absence of that evidence results in the dismissal or withdrawal of the charge, the subsequent discovery of that evidence will permit the resurrection of the charge, provided that the other two elements are present, viz, the evidence was fraudulently concealed and the injured party could not have discovered the evidence earlier through the exercise of due diligence.[12]

On review, the D.C. Circuit again reversed and remanded, saying that the Board had "again failed to articulate a coherent materiality standard. . . ."[13] The court stated that while the Board might be free to adopt its own standard for what constituted "materiality," here the Board had "purported to adopt this circuit's [*Fitzgerald*] standard for materiality," but had then articulated it in a way that "makes no sense" and is "internally inconsistent."[14] The court explained its reasoning as follows:

> The Board's initial statement of its test—that "concealed evidence is 'material' if it would make a critical difference between establishing a violation and not doing so"—simply cannot be read consistently with its second articulation of the test—that "if the absence of that evidence results in the dismissal or withdrawal of the charge, the subsequent discovery of that evidence will permit the resurrection of the charge." The first statement of the test, which essentially requires that allegedly concealed evidence, to be material, be dispositive of the unfair labor practice claim, is a much higher standard than the second articulation of the test, which appears to require only evidence sufficient to defeat a motion to dismiss the charge. These are two incompatible standards.[15]

The court held that the second part of the Board's standard was an accurate statement of, or "akin" to, its own materiality test, which is as follows:

> We do not provide for tolling simply because a plaintiff's ability to mount a successful case has been impaired in some degree. Instead, we provide for tolling only when concealment has so impaired the plaintiff's case that he is not able to survive a threshold motion to dismiss for failure to tender a claim that would advance beyond the pleading stage.[16]

The court then went on to apply the "correct" test to find that the allegedly concealed evidence *was* material, and remanded to the Board to determine whether the evidence had been fraudulently concealed. On remand (*Brown & Sharpe Mfg. Co. III)*,[17] the Board accepted the court's analysis as the law of the case and found that the material evidence at issue had not been fraudulently concealed. The court subsequently affirmed on review.[18] In no subsequent case has the Board had occasion to clarify its materiality test in light of the court's concerns. We therefore take this opportunity to do so.

Analysis

We agree with the court that, while purporting to adopt the *Fitzgerald* standard for materiality, the Board in *Brown & Sharpe II* articulated that test in a way that was internally inconsistent. We also agree that the first part of that test—that concealed evidence is material if it would make a critical difference between establishing a violation and not doing so—is too high a standard. Requiring dispositive evidence to avoid Section 10(b) is contrary to the concept of "tolling" for fraudulent concealment. To require the General Counsel to show that he can "*prevail* on the merits in order to allow tolling for a hearing on the merits, . . . [would] effectively nullif[y] the purpose of tolling."[19] The question then is whether the second part of the standard articulated in *Brown & Sharpe II* (which the court stated *was* an accurate statement of the circuit's materiality test, but which the Board failed to apply) is the most appropriate test of materiality for the Board to adopt. In deciding this case, the judge applied, as the current state of the law, the second part of

[10] 553 F.2d 220 (D.C. Cir. 1977) ("[r]ead into every federal statute of limitations . . . is the equitable doctrine that in the case of defendant's fraud or deliberate concealment of *material facts* relating to his wrongdoing, time does not begin to run until plaintiff discovers, or by reasonable diligence could have discovered, the basis of the lawsuit."). Id. at 228 (emphasis added).

[11] 312 NLRB 444.

[12] Id. at 445.

[13] *Machinists District Lodge 64 v. NLRB*, 50 F.3d 1088, 1093 (1995).

[14] Id.

[15] Id.

[16] Id. at 1094 (quoting *Hohri v. U.S.*, 782 F.2d 227, 249–250 fn. 57 (D.C. Cir. 1986)).

[17] 321 NLRB 924 (1996).

[18] 130 F.3d 1083 (D.C. Cir. 1997), cert. denied 524 U.S. 926 (1998).

[19] 50 F.3d at 1094 (emphasis added).

the *Brown & Sharpe II* materiality test, recognizing that the Board might decide to alter its test in the future.

As the D.C. Circuit recognized, since neither Section 10(b) nor any other provision of the Act addresses the issue of time limits on revival of a dismissed charge, the Board is exercising its policy making authority to fill this "gap" in the statutory scheme.[20] Thus, the Board is not required to use the court's standard, "and may well be free to" use another.[21]

On further reflection, we have decided to modify our materiality standard to better reflect Board administrative procedure. As discussed, the D.C. Circuit likened the second part of the test—"if the absence of [the newly discovered] evidence results in the dismissal or withdrawal of the charge, the subsequent discovery of that evidence will permit resurrection of the charge"—to the test used when assessing pleadings on a motion to dismiss. The difficulty with applying this formulation in unfair labor practice proceedings derives from the significant differences between Board administrative process and federal civil litigation practice, and in particular the "considerable power" which the statutory scheme gives the General Counsel of the Board.[22]

"Enforcement of the NLRA's prohibition against unfair labor practices is accomplished through a split-enforcement system, assigning all prosecutorial functions to the General Counsel of the NLRB and all adjudicatory functions to the Board."[23] Under the Act, the enforcement scheme begins with the filing of a charge with a regional office of the Board alleging that a violation of the Act has been committed by an employer, a labor organization, or their agents. "Any person," that is any individual or organization, may file a charge. The charge is then investigated by a Board agent from a regional office acting on behalf of the General Counsel. Generally, upon completion of the investigation, the regional director will decide whether there is reasonable cause to believe the Act has been violated and whether a formal complaint is warranted. If the regional director determines that the charge lacks merit, the regional director will refuse to issue a complaint and dismiss the charge. This refusal, or dismissal, may be appealed to the General Counsel.[24]

The General Counsel's authority over the issuance of complaints is plenary. Under Section 3(d) of the Act, the General Counsel of the NLRB "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board." This broad discretionary authority is not reviewable by the Board or the courts.[25] The Supreme Court has declared that "the General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint."[26] The Court has described the division of authority between the Board and the General Counsel as follows:

> Although Congress has designated the Board as the principal body which adjudicates the unfair labor practice case based on such charge, . . . the Board may adjudicate only upon the filing of a "complaint"; and Congress has delegated to the Office of General Counsel "acting for the Board" the unreviewable authority to determine whether a complaint shall be filed, ... In those cases in which he decides not to issue a complaint, no proceeding before the Board occurs at all. The practical effect of this administrative scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of General Counsel that his claim is sufficiently meritorious to warrant Board consideration.[27]

This description highlights the critical distinction between civil litigation and the Board administrative process. In civil litigation, a plaintiff files suit directly in court, the court makes the threshold legal determination whether the case will proceed or be dismissed for failure to state a claim, and an order dismissing the case is appealable. By contrast, the decision to both investigate and dismiss a charge (or issue complaint) is committed by statute to the unreviewable discretion of the General Counsel of the agency, not to the Board. Upon filing a charge and presentation by a charging party of supporting evidence, it is then up to the General Counsel of the NLRB to decide whether to prosecute. If he decides not to do so, he dismisses the charging party's charge. Al-

[20] 949 F.2d at 445.

[21] 50 F.3d at 1094 (quoting 949 F.2d at 449).

[22] *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 139 (1975).

[23] *Beverly Health Services v. Feinstein,* 103 F.3d 151, 152 (D.C. Cir. 1996), cert. denied 522 U.S. 816 (1997) (citing *NLRB v. Food & Commercial Workers Local 23*, 484 U.S. 112, 123–128 (1987).

[24] The General Counsel permits appeals from adverse determinations on the issuance of complaints to be reviewed by a central office within the Office of the General Counsel to insure that a national labor policy is uniformly administered.

[25] See, e.g., *Fitz v. Communications Workers,* affd. 917 F.2d 62 (D.C. Cir. 1990), cert. denied 499 U.S. 960 (1991); *United Elec. Contractors Assn. v. Ordman*, 366 F.2d 776 (2d Cir. 1966), cert. denied 385 U.S. 1026 (1967).

[26] *Vaca v. Sipes,* 386 U.S. 171, 182 (1967). See also *NLRB v. Food & Commercial Workers Local 23,* 484 U.S. 112.

[27] *NLRB v. Sears, Roebuck & Co.,* 421 U.S. at 138–139. See also H. Con. Rep. 510, on H.R. 3020, 80 Cong., 1st Sess., p. 37. The purpose of Sec. 3(d) is to separate the Board's prosecutorial and adjudicative functions.

though this action is termed a "dismissal," it is not the same as a dismissal of a private plaintiff's case. The former is the General Counsel's unreviewable decision not to prosecute, i.e., not to file suit; the latter is a court's judgment, subject to review, that a filed suit has no merit. Thus, unlike a court, the Board does not make the threshold determination whether a case will proceed on the merits.

Because of these procedural distinctions, we believe that the second part of the standard articulated in *Brown & Sharpe II,* sets a threshold for materiality that is too low. Thus, in every case where the General Counsel decides to resurrect a previously dismissed charge based on newly discovered evidence, it could be said that the "absence of the evidence resulted in dismissal of the charge." As the court discussed,

> the mere fact that the General Counsel decides to reinstate previously dismissed charges based on allegedly concealed evidence, as occurred in this case, is not dispositive. The threshold of materiality is not that low. Rather, it remains the province of the Board to determine whether the General Counsel's decision to reinstate the charges at issue was reasonable in light of the delineated materiality standard.[28]

Accordingly, we must delineate a standard that achieves a balance between the statutory limitations policy of repose and the important purpose of tolling for fraudulent concealment. In other words, we seek a standard that is not too high—i.e., does not require newly discovered evidence that is dispositive of a violation in order to toll the limitations period—nor too low—i.e., does not leave the General Counsel free to reinstate charges in every case of newly discovered evidence. And, we must adopt a standard tailored to the administrative adjudicatory process under this statute.

The Board's Materiality Standard

Once the General Counsel does issue an unfair labor practice complaint, it is subject to adjudication by the Board. As part of that process, the Board will consider a respondent's defense that the complaint allegations are time-barred under the 6-month limitations period provided for by Section 10(b) of the Act. When, as in the instant case, the complaint allegations are based on charges resurrected outside the 10(b) period, the General Counsel can assert, in response to that defense, that the running of the 10(b) period is tolled by fraudulent concealment.

When the General Counsel seeks to reinstate a dismissed or withdrawn charge outside of the 6-month limitations period, the issue is no longer one of the General Counsel's prosecutorial discretion. Rather, the application of Section 10(b) is a legal question of the *Board's* authority to dismiss a complaint as time-barred, distinguishable from questions of prosecutorial discretion. The standard guiding that determination must be an objective one based on the *Board's* examination of the evidence existing both at the time of the prosecutorial decision to dismiss the charge and the time of the decision to reinstate the charge. The standard set must not simply duplicate the *General Counsel's* determination that the acquisition of the fraudulently concealed evidence made a difference in the decision to issue a complaint. As the D.C. Circuit put it, "the mere fact that the General Counsel decides to reinstate previously dismissed charges based on allegedly concealed evidence, as occurred in this case, is not dispositive."[29] That standard is too low and effectively nullifies the Board's role as the adjudicative body.

Taking all of this into account, therefore, we have decided to adopt a standard of materiality under which a charge may be reinstated if the addition of evidence previously fraudulently concealed would, as an objective matter, make the critical difference in determining whether or not there was reasonable cause to believe the Act was violated. The new evidence would make a "critical difference" if it so significantly alters the total mix of information available that, for the first time, there is reasonable cause to believe that the Act has been violated. Under this objective "reasonable cause" standard our inquiry is twofold: 1) whether, based on the evidence before the General Counsel at the time of dismissal, there was no reasonable cause to believe that the Act had been violated, and 2) whether, based on the evidence before the General Counsel at the time of the reinstatement of the charge and issuance of complaint (including the fraudulently concealed evidence), there is reasonable cause to believe that the Act was violated. If we find that there was "reasonable cause to believe" at the time of dismissal, then the concealed evidence, even if it strengthens the case, is simply incremental and does not significantly alter the total mix of information initially available to the General Counsel. Such evidence will not be treated as "material," and Section 10(b) will bar the complaint.

We believe that this standard strikes the middle road between the two articulations of the materiality standard set forth by the Board in *Brown & Sharpe*, one of which placed the bar too high and the other too low for Board procedure. This test focuses initially on the assessment of the evidence at the time the charge was originally dis-

[28] 50 F.3d at 1094.

[29] Id.

missed. The assessment is one of law and objectivity, that is, whether there was reasonable cause to believe the Act has been violated.[30] A similar assessment is made at the time of reinstatement of the charge. Thus, our test avoids the error of setting the bar too high, i.e., the finding of a violation. At the same time, it avoids the error of setting the bar too low, i.e., making the actions of the General Counsel dispositive.

In applying the materiality standard announced, we will examine only whether the new evidence would make a critical difference on the *legal* determination of whether there is reasonable cause to believe the Act has been violated. This limited focus recognizes the General Counsel's authority under Section 3(d) of the Act. Thus, we acknowledge that many considerations, apart from the purely legal sufficiency of the evidence presented, go into the sometimes policy-laden determination whether to issue a complaint or dismiss the charge. "A charging determination . . . is a quintessential example of a prosecutorial decision. It involves a balancing of culpability, evidence, prosecutorial resources, and the public interest. The weighing of all those considerations factors into the issuance of a complaint."[31] It is not our function to second-guess the General Counsel on the other considerations that factor into the decision to dismiss a charge, and by objectively evaluating the "legal sufficiency" of the evidence before the General Counsel at the time of dismissal, we avoid making judgments reserved exclusively to the General Counsel.

At the same time, however, the standard also gives appropriate weight to the policies underlying Section 10(b). Thus, if the General Counsel initially had evidence that would have supported a reasonable cause determination, but did not issue a complaint, the addition of cumulative evidence, even if fraudulently concealed, does not justify unsettling the initial exercise of discretion to dismiss the charge or the policy of repose underlying Section 10(b).[32]

In short, the General Counsel is entitled to weigh all factors in the exercise of his prosecutorial discretion, and may decline to issue a complaint on a timely filed charge for a variety of discretionary reasons, even if the evidence before him establishes reasonable cause. But when he has made that judgment, we believe the policy of repose embodied in Section 10(b) is best served by holding the General Counsel to that judgment, even if new evidence strengthens the prior "legally sufficient" case. At the same time, the General Counsel will not be deprived of his discretion to proceed (or not) upon the filing of an untimely charge supported by fraudulently concealed evidence which satisfies our materiality standard. Indeed, the addition of "material" evidence previously concealed will enlarge his options, giving him for the first time an opportunity to exercise the discretion to proceed that initially was unavailable due to insufficient information before him.

In sum, the standard we announce today does not require that the new evidence be dispositive of a violation of the Act (the first part of the *Brown & Sharpe* test). Reasonable cause is a lower standard. But, it does require more than what was described in the second part of the *Brown & Sharpe* test. The standard we adopt is an analogue to the test for ruling on a federal court motion to dismiss, in that the absence of evidence makes a critical difference in whether the General Counsel, like a plaintiff, can get over the preliminary legal threshold. However, it is alike in the legal respect only. The distinction, and where the analogy breaks down, relates to the considerable factor of prosecutorial discretion present in unfair labor practice case procedure. When the General Counsel decides not to issue a complaint, no proceeding before the Board occurs at all. We believe that the test announced promotes the policy of repose underlying Section 10(b) by ensuring an objective review of the alleged materiality of the fraudulently concealed evidence. At the same time, this standard will permit the reinstatement of a charge where the respondent, by engaging in fraudulent concealment of material facts, has forfeited its right to any assurances that it will not be called on to defend itself against stale charges.

[30] See, e.g., *Kinney v. Pioneer Press,* 881 F.2d 485, 490 fn. 2 (7th Cir. 1989). In discussing a reasonable cause inquiry, that court suggested that "[u]nless acting capriciously, the General Counsel would establish something like 'reasonable cause' as the threshold for filing an administrative complaint. Nothing in the statute requires this, however, see 29 U.S.C. 153(d), and courts do not review the General Counsel's exercise of prosecutorial discretion." As the court explained, "[i]n any case, the level of belief required to proceed to court cannot equate with the level of proof required to succeed in court; otherwise the court would have no discretion to exercise. Reasonable cause focuses on the preliminary investigation instead of on the likely success of the complaint on the merits." Cf. *Plumbers Local 562 (C & R Heating & Service Co.),* 328 NLRB 1235 (1999) (description of reasonable cause standard necessary to proceed under Sec. 10(k) of the Act to resolve a jurisdictional dispute).

[31] *Beverly Health Services v. Feinstein*, 103 F.3d at 153. See also *Staff Builders Services v. NLRB*, 879 F.2d 1484, 1486 (7th Cir. 1989). (The Board's exercise of its discretionary jurisdiction in a particular case "is a matter of resource allocation. . . . [T]he Board must decide where to devote its energies.")

[32] Because there are a myriad of reasons, in addition to the legal merits of the case, that factor into the General Counsel's discretionary decision not to prosecute a case, the Board's conclusion in a given case, that there was reasonable cause to believe that the Act was violated, is not to be taken as a criticism of the General Counsel.

Application to this Case

Applying our standard of materiality to the present case, we find that the new evidence was not material because, at the time the General Counsel dismissed the charge, there was reasonable cause to believe that the Act had been violated.

The Union filed its unfair labor practice charge on April 25, 1990, alleging that Morgan's Holiday Market, Inc. (Morgan's) owned by Richard Morgan Sr., had unlawfully repudiated its collective-bargaining agreement with the Union at its Chico, California location. At the heart of this charge, as the judge recognized, was the issue of whether Morgan's was an alter ego of North State Grocery, Inc. (North State), the purchaser of the Chico store. At the time the charge was under investigation, the Union and the General Counsel possessed a great deal of information concerning the relationship between Morgan's and North State. The Union knew that the owners of North State were the son and daughter of Richard Morgan Sr. The Union also knew that the Chico store operated under the same name and sold the same products to the same target audience as had the store under Morgan's. With regard to management, the Union knew that Morgan Sr., through an advisory services agreement, provided his expertise to North State, and that North State retained two supervisors previously employed by Morgan's. In addition, the Union knew that Morgan Sr. had stated that he would sell some of his stores in order to meet the economic demands of the Union, and that at least three stores had already been sold and were being operated on a nonunion basis, including the previous sale of one unionized store to North State.

The Union also knew that Morgan Sr.'s attorney, John Reese, was on the Board of Directors for Morgan's Holiday Market. During the investigation, the Region learned that Reese was on the Board of Directors for North State. Also during the investigation the Region learned that Morgan Sr.'s son and daughter had obtained initial financing from the company that was the supplier for Morgan's.

The Region dismissed the charge by letter dated July 25, 1990. The dismissal letter stated that the investigation had failed to establish that Morgan's had sold its Chico store in order to repudiate its collective-bargaining agreement with the Union. The letter stated that the sale was a bona fide arm's length transaction, and that North State maintained ultimate control over the day-to-day operation and labor relations policies of the store. The letter concluded that it therefore "does not appear that North State is an alter ego of the [Morgan's]."

In 1992 the Union's pension and health and welfare trust funds filed suit in Federal court alleging alter ego theory as to Morgan's and North State pursuant to ERISA[32] and Section 301.[33] During pretrial discovery, the attorney for the trusts ascertained several previously unknown facts. He discovered that North State was owned by The Hooker Creek Irrevocable Trust, whose sole trustee was John Reese, Morgan Sr.'s attorney, and the beneficiaries of the Trust were the son and daughter of Morgan Sr. He also learned that Morgan Sr. had committed to remain involved with North State for at least 7 years. In addition, he learned that Morgan Sr. had guaranteed the leases and the start-up loans that North State had received from Morgan's and North State's common supplier. Further, he discovered that Morgan's and North State filed a joint loan request in 1991 that included a written plan outlining the potential acquisition by North State of additional Morgan's stores.

The judge found that at least one piece of this evidence was affirmatively concealed. This was the existence of the Hooker Creek Irrevocable Trust,[34] and with it, the knowledge that Morgan Sr.'s son and daughter were the beneficial owners rather than the outright owners of the corporation.

We find that the subsequently discovered evidence does not make a critical difference, as we have defined it, in establishing reasonable cause to believe that the Act had been violated. Rather, objectively viewing the evidence known to the Union and General Counsel at the time of dismissal of the charge, we find that there was reasonable cause to believe that Morgan's had, as alleged, unlawfully repudiated its agreement with the Union following the sale of the Chico store to North State, because North State was an alter ego of Morgan's.

As the judge set out, the Board applies a "flexible" test to determine alter ego status, which involves consideration of whether the two enterprises have substantially identical management, business purpose, operations, equipment, customers, supervision, and ownership. See *Advance Electric*, 268 NLRB 1001 (1984); and *Crawford Door Sales Co.*, 226 NLRB 1144 (1976). Facts known to the Union and the General Counsel during the investigation of the initial charge related to each of the factors relevant to an alter ego determination. The business purpose, operation, equipment, and customers were the same. The evidence also showed that Morgan Sr., owner of Morgan's, remained involved in the management of

[32] Employee Retirement Income Security Act, 29 U.S.C. Sec. 1001 et. seq.

[33] 29 U.S.C. 185.

[34] The judge erroneously stated that the Trust was not introduced into evidence in this proceeding. However, the conclusions she drew from the title of the trust are correct and her failure to realize the Trust was entered into evidence by the General Counsel does not affect the outcome of the case.

North State, through an advisory services agreement to provide his expertise to North State. In addition, two of Morgan's supervisors continued to work at North State, and Morgan's attorney served on the boards of directors of both companies. Moreover, members of the same family owned both companies. As the administrative law judge noted, where other alter ego factors exist, ownership of both companies by members of the same family can be deemed "substantially identical." See, for example, *Kenmore Contracting Co.,* 289 NLRB 336, 337 (1988), enfd. mem. 888 F.2d 125 (2d Cir. 1989).

Finally, although alter ego status does not require a showing that the motivation for creating the new entity was to evade obligations of the collective-bargaining relationship, here it was known that Morgan Sr. had stated that he would sell some of his stores in order to meet the economic demands of the Union, and that, in fact, he had sold several stores, including a prior sale of a unionized store to North State, which was operating that store on a nonunion basis.

Accordingly, we find that because the evidence known at the time of the dismissal of the original charge provided the basis for a reasonable cause to believe that the Act had been violated as alleged in the charge, the later discovered evidence, while arguably strengthening the case**,** was simply incremental and did not significantly alter the total mix of information available to the General Counsel initially. Accordingly, we find that the new evidence does not meet our standard of materiality, and therefore we shall dismiss the complaint.

ORDER

The recommended order of the administrative law judge is adopted and the complaint is dismissed.

Jonathan J. Seagle, Esq., for the General Counsel.

Anne E. Libbin, Esq. (Ann E. Polus, Esq., on the brief) (*Pillsbury, Madison & Sutro*), of San Francisco, California, for Respondent Morgan's Holiday Markets, Inc.

Patrick W. Jordan and *Christine Coverdale, Esqs.* (*Keck, Mahin & Cate*), of San Francisco, California, for Respondent North State Grocery, Inc.

Andrew J. Kahn, Esq. (*Davis, Cowell & Bowe*), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. The General Counsel and Charging Party[1] contend that they should be allowed to litigate time-barred allegations regarding the Respondents' alleged alter ego status because the 6-month statute of limitations,[2] which Respondents assert as an affirmative defense, has been tolled pursuant to the doctrine of fraudulent concealment. Following 16 days of hearing at various times from June through October 1995 and an agreement by the parties to separately litigate the limitations issue, on October 30, 1995, the General Counsel and the Charging Party rested. Thereafter, the Respondents filed a motion to dismiss for failure to prove that the statute of limitations should be tolled.

The procedural background frames the limitations issue. On April 25, 1990, the Charging Party filed a charge in Case 20–CA–23314. The parties agree that this was a timely charge. This charge alleged that Morgan's Holiday Markets, Inc. (Morgan's) violated Section 8(a)(1) and (5) of the Act by failing to recognize the Charging Party at its grocery store in Chico, California. At the heart of this charge was the issue of whether Morgan's was an alter ego of North State Grocery, Inc. (North State), the purchaser of Morgan's Chico store. On July 25, 1990, this charge was dismissed. No appeal was taken from the dismissal and no other unfair labor practice charge was filed within the 6-month limitations period.

The charge in Case 20–CA–25025, filed November 25, 1992, and amended January 21, 1993, alleged that North State Grocery, Inc. (North State) and Morgan's were alter egos and had failed to observe the terms and conditions of the collective-bargaining agreements at the North State stores and had discriminated against union supporters in violation of Section 8(a)(1), (3), and (5). A charge in Case 20–CA–25176 filed February 17, 1993, as amended March 29, 1993, alleged unilateral changes, bad-faith bargaining, direct dealing, and repudiation of the trust agreement of the collective-bargaining agreement in violation of Sec. 8(a)(1), (3), and (5).[3] The consolidated complaint in Cases 20–CA–23314, 20–CA–25025, and 20–CA–-25716 issued on December 16, 1994. It resurrects the dismissed charge in 20–CA–23314 and alleges that, "commencing on an unknown date in May 1989 . . . the Respondents fraudulently concealed relevant facts from the Union regarding the establishment of [North State] and its relation to [Morgan's]."[4]

[1] The Charging Party, also referred to as the Union or Local 588, is United Food & Commercial Workers, Local 588, United Food & Commercial Workers International Union, AFL–CIO.

[2] Sec. 10(b) of the Act governs issuance of a complaint upon a charge of unfair labor practice, "*Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board."

[3] The consolidated complaint allegations based on the charge in Case 20–CA–25176 are not subject to the motion to dismiss. By separate order issued Monday, November 13, 1995, the parties were informed of my ruling on this motion to dismiss and instructed to show cause why Case 20–CA–25176 should not be severed. In a conference call on November 29, 1995, all parties stated their positions regarding severance. Having fully considered the parties' positions, a separate order issued severing Case 20–CA–25176 and continuing it before me.

[4] The Charging Party stated an intention to try this case on an alternative theory of fraudulent concealment from the Regional Office of the NLRB. The General Counsel and Respondents moved to preclude litigation of this alternative theory. By order of July 12, 1995, I ruled that the Charging Party was precluded from advancing an alternate theory to the one alleged in the consolidated complaint. A request for special permission to appeal this ruling pursuant to Rule 102.26 followed. On September 14, 1995, the Board granted the request and affirmed the above ruling.

On the entire record and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

A. Events Preceding the First Unfair Labor Practice Charge

Morgan's, owned by Richard Morgan Sr. (Morgan Sr.), has had a long-bargaining relationship with the Union. Morgan's stores are operated as "Holiday Quality Markets." Local 916, which merged with Local 588 in April 1989, represented grocery employees at many of Morgan's stores.[5] Local 916 representatives were aware in the mid-to-late 1980s that Morgan Sr. desired economic relief from the terms of the collective-bargaining agreements. In fact, Local 916 agreed to economic concessions during this period of time. Local 916 knew that Morgan Sr. had stated that he might have to sell some stores in order to meet the terms of the contracts and, in fact, in May 1988 he sold two stores located in Redding, California, to Shasta View for that stated purpose.

Effective April 2, 1989, Morgan Sr. sold Holiday Market No. 5 located on Solano Street in Corning, California, to North State. The Union was notified of this sale by letter of April 3, 1989. This was the first known sale of a Morgan's store to North State. North State operated this store nonunion. By visiting the store following its sale, the Union was able to ascertain that the store continued to operate as a "Holiday Quality Market" with the same brands of product, the same signage, and the same advertisements as the unionized Morgan's stores. During grievance meetings, when this subject was discussed, Floyd Morgan, personnel director of Morgan's, stated that North State was a separate company run by Richard Morgan Jr. (Morgan Jr.), Richard Sr.'s son. The Union was also told by Floyd Morgan that the purchase was an arm's-length transaction. The Union also knew that Morgan Jr. was listed as the agent for service of process for North State. No unfair labor practice charge was filed regarding this transaction. By memorandum of April 24, 1989, Local 588 business representative Boehme notified Local 588 President Loveall as well as Reginato, secretary/treasurer of Local 588, and Heise, grievance coordinator for Local 588, that North State was opening a store in Red Bluff on May 1, 1989.

In both 1986 and 1989, a representative of Provigo, Morgan's supplier, participated in bargaining. The collective-bargaining agreement expired June 30, 1989, shortly after the merger of Local 916 with Local 588. In September 1989, the Union and Morgan's reached agreement for a 3-year contract.

Effective November 13, 1989, Morgan's Store No. 12 located on Esplande in Chico, California, was sold to North State. Overnight, the store became nonunion. By letter of December 13, 1989, the Union requested the identity of the current owner of Store No. 12, each shareholder and the shareholder's interest, copies of all documents which set forth any purported sale, the sales price and manner of payment, information regarding employment of former employees, and the ownership interest retained by Morgan's. The Union also asserted that it did not believe there was a bona fide change in ownership.

Morgan's attorney John W. Reese Jr. responded to Loveall by letter of December 15, 1989, stating that the Union's request for information was untimely and, in any event, there was "no common ownership or control," no shareholders in common, the sale of the store was pursuant to written agreements and appropriate escrows, the sales price was a market value negotiated price, and Morgan's had subleased the property to North State by permission of the owner of the real property. In an additional letter to Local 588 administrative assistant, Frank Neth, dated January 3, 1990, Reese stated that Morgan's had no control over North State or its employees.

In January 1990, by agreement of the parties, Union Counsel Steve Stemerman reviewed the sales documents involved in the Chico transfer at Reese's offices. Stemerman inquired about ownership documents for North State but was told these were not available because North State was a separate entity. Reese confirmed that Morgan Sr.'s son and daughter were the true owners of North State. Specifically, Stemerman was shown (1) an agreement for purchase and sale of assets, (2) a warranty bill of sale, (3) an equipment lease, (4) a determination of inventory, (5) a promissory note, (6) a personal guarantee, (7) a sublease, and (8) a licensing and advisory services agreement. From these documents, Stemerman's notes reflect that he learned that the purchase price for the Chico store was the retail value of the inventory as of November 12, 1989, minus 20 percent plus $15,000 for the liquor license. The inventory value reflected was $219,826.49. Twenty thousand dollars was placed in escrow with the remainder paid by a 3-year promissory note with interest at 10 percent. Monthly payments on this note began January 1, 1990, at $6931.83 per month. The note was guaranteed by Morgan Jr. and his sister, Sharon LaVonne Zacharias.

Stemerman further noted there was no assumption of liabilities and that North State agreed to retain the trade name "Holiday Quality Foods" pursuant to the licensing and advisory services agreement. This agreement further provided that advice regarding purchasing merchandise, pricing, merchandising, advertising along with licenser's stores, inventory control services, developing, revising floor layout, bookkeeping/accounting, and security could be obtained for one percent of total gross monthly sales. Stemerman learned that Morgan's retained the shopping carts, fixtures, and equipment and leased these to North State for $3226.72 per month with no deposit.

By memorandum of January 30, 1990, Local 588 Business Representative Boehme stated to co-director of organizing DiProsper that Morgan's claimed that certain stores previously acquired by Holiday Quality Markets were being operated by North State nonunion.

[5] The Respondents deny that Local 588 represented employees in appropriate bargaining units and at hearing to date, the parties have not entered into stipulations regarding this matter. For purposes of this motion, it is unnecessary to resolve this matter definitively. For purposes of this motion I conclude that the record reflects a bargaining status and further reflects that Local 588, following mergers of various other locals with it, is the collective-bargaining representative. In 1989, Local 916, which represented certain of Morgan's grocery employees, merged with Local 588. In addition, former meatcutters Local 498 merged with Local 588 in 1991 and meatcutters Local 115 transferred representation of some of Morgan's employees to Local 588 in 1992.

B. The Initial Unfair Labor Practice Charge: Case 20–CA–23314

On April 25, 1990, the Union filed a charge in Case 20–CA–23314 alleging that Morgan's had repudiated its collective-bargaining agreement at its Chico location. The Union submitted a position letter from Stemerman and an affidavit from Frank Neth, assistant to the president of Local 588. In addition to noting the financial transactions outlined above, Stemerman's letter stated, "While I suspect that whatever money was actually placed into escrow was not put up by the son and daughter, the Union does not have access to information which would disclose the actual source for that money." Neth's affidavit noted that the store looked the same before and after the transfer as far as signage, products, and advertising. He also stated that two supervisors had carried over from Morgan's to North State. Morgan's counsel, Henry Telfeian, submitted position letters and allowed the Region to examine the same documents which Stemerman had seen. Telfeian told the Region that the son and daughter obtained their initial financing through Provigo, the joint supplier for Morgan's and North State.

After unsuccessfully soliciting a withdrawal of the charge, the Region dismissed it by letter of July 25, 1990, stating,

> The investigation did not establish that the Employer sold its Chico store in order to repudiate its collective bargaining agreement and to withdraw recognition from the Union. Rather, the evidence disclosed that the sale was a bona fide arm's length business transaction. Although the store appears to the public to still be part of the Employer's chain of supermarkets, and the purchaser, North State Grocery, Inc., pays the Employer for store management consulting services, the instant case is distinguishable from *Big Bear Supermarkets No. 3,* 239 NLRB 179 (1978). North State maintains ultimate control over the day-to-day operations of the store and labor relations policy. Further, North State may sell products and brands not sold by the Employer's other stores. With respect to the management consulting service mentioned above, North State is not obligated to implement suggestions made by Employer representatives. Thus, it does not appear that North State is an alter ego of the Employer. Furthermore, there is no independent evidence of antiunion motivation for the sale of the store.

No appeal from the dismissal was taken.

C. Postcharge Developments

By letter of April 11, 1991, Morgan Sr. gave notice to Local 588 President Loveall that Morgan's Store No. 21 located in Burney, California, would be sold effective April 30, 1991. North State was named as the purchaser. Morgan Sr. stated that he would be willing to meet and bargain regarding the effects of the sale. The Union thereafter picketed this store with area standards signs.

Following notice on February 10, 1992, of Morgan's intention to sell its Store No. 18 on Antelope Boulevard in Red Bluff, California, to North State effective February 15, 1992, Stemerman wrote to Reese requesting information in order to ascertain whether the transaction was arm's length. Stemerman also requested effects bargaining. Following the sale, Reese offered to show the Union the transaction documents. Although Union Counsel Kahn called for these documents later, they were never received.

D. Section 301 and ERISA Action

An article in the February 10, 1992 *Red Bluff Daily News* featured Morgan Sr. and referred to his "31-store chain" and 850 employees, numbers which could only be accurate if they included North State. In addition, the article noted that Morgan Jr. planned to get into the grocery store business attributing the following quote to Morgan Sr.: "My goal is for them [his son and daughter] to have their own companies some day."

A lawsuit alleging alter ego theory as to Morgan's and North State pursuant to ERISA[6] and Section 301[7] was commenced by the union pension and health and welfare trust funds. In response, Morgan's filed a unit clarification petition with the NLRB and thereafter moved to stay the district court action. On November 13, 1992, the district court granted the motion to stay.

Prior to the action being stayed, Kahn, as counsel for the trusts, conducted pretrial discovery of defendants and third parties. Based on this discovery, he ascertained the following previously unknown facts:

- Ownership: The Hooker Creek Irrevocable Trust owned North State. There was only one trustee, John W. Reese, Jr.
- Management: Reese served on the Board of Directors of both corporations.[8] Morgan Sr. committed to stay involved with the business for at least 7 years.
- Operation: Respondents' common supplier Provigo made large loans to North State when North State began operations. Morgan Sr. guaranteed the start-up loans and leases. Six hundred shares of stock in North State owned by the Hooker Creek Irrevocable Trust for the benefit of Richard E. Morgan Jr. and 400 shares of stock owned by the Hooker Creek Irrevocable Trust for the benefit of Sharon LaVonne Zacharias were assigned by Reese to Provigo on October 12, 1990. A joint loan request from Morgan's and North State was filed on March 31, 1991.
- Motivation: In support of the joint loan request was a written plan dated March 31, 1991, outlining potential acquisition by North State of further Morgan's stores, detailing the year of potential acquisition and assign-

[6] Employee Retirement Income Security Act, 29 U.S.C. Sec. 1001 et seq.

[7] 29 U.S.C. Sec. 185.

[8] Prior to filing the initial unfair labor practice charge, the Union knew that Reese served on Morgan's board of directors. However, through filing a Freedom of Information request to the Region seeking all materials submitted by the Employer in Case 20–CA–23314, on August 19, 1992, Kahn ascertained that Reese, who he previously knew was on Morgan's Board of Directors, was also on North State's board of directors. The Region, presumably, knew this when it dismissed the charge.

ing a store number in the North State system to each store.

E. Current Unfair Labor Practice Charges

On November 25, 1992, the Union filed an unfair labor practice charge in Case 20–CA–25025. As amended on January 21, 1993, the charge alleges that Morgan's and North State, operating as an alter ego or single employer, violated Section 8(a)(1), (3), and (5) by failure to apply the collective-bargaining agreement, by bargaining in bad faith over the closing and sale of stores, and by discriminating against union supporters. On February 17, 1993, the Union filed a charge in Case 20–CA–25176 alleging violation of Section 8(a)(1), (3), and (5) by unilateral implementation of new terms and conditions of employment, unlawfully insisting on waiver of the Union's position in NLRB charges, withdrawal from pension, health and welfare funds for discriminatory reasons, and bargaining in bad faith. This charge was amended on March 29, 1993, to add allegations of repudiation of the trust agreement and direct dealing. The allegations in the consolidated complaint based on the charge in Case 20–CA–25176 are not subject to this motion to dismiss.

III. ANALYSIS

Preliminarily, I find that this case does not involve fraud which "is of such character as to conceal itself,"[9] or "self-concealing" fraud. On the merits, of the three components of the test for fraudulent concealment—(1) deliberate concealment, (2) of material facts, (3) which could not otherwise have been discovered through due diligence,[10] I am convinced that only materiality is at issue. When the facts are viewed in a light most favorable to the General Counsel, I do not believe that the materiality threshold has been met. Were it necessary to reach the further issues, I would find that at least one fact which the Union discovered in 1992 was deliberately concealed and I would further find that the Union exercised due diligence in seeking to uncover all relevant facts.

Generally, a timely filed charge which has been dismissed cannot be reinstated outside the limitations period absent fraudulent concealment. *Ducane Heating Corp.,* 273 NLRB 1389, 1390 (1985), enfd. without opinion, 785 F.2d 304 (4th Cir. 1986). Accordingly, the consolidated complaint alleges that Morgan's "intentionally misrepresented certain facts relating to the ownership and control of stores covered by the [Charging Party's] collective-bargaining agreements . . . in response to the Union's requests for information relating to the retail food stores newly opened, acquired and sold to Respondent North State." The consolidated complaint further alleges that the Charging Party could not reasonably have known before October 2, 1992, that North State stores were subject to the terms of the collective-bargaining agreements between it and Morgan's.

A. The Self-Concealing Doctrine

The General Counsel argues that Morgan's engaged in a "self-concealing" scheme designed to conceal the operative facts of its alter ego relationship with North State by stating that it had "sold the store(s)" implying that it had no control over the purchaser or its employees. The General Counsel relies on *O'Neill, Ltd.,* 288 NLRB 1354 (1988), enfd. 965 F.2d 1522 (9th Cir. 1992), and *Barnard Engineering,* 295 NLRB 226 (1989). Although these cases do not utilize the term "self-concealing" fraud, the General Counsel argues that these cases implicitly adopt the self-concealing doctrine set forth in *Hobson v. Wilson,* 737 F.2d 1, 33–35 (D.C. Cir. 1984), cert. denied sub nom, *Brennan v. Hobson,* 470 U.S. 1084 (1985). This doctrine, in turn, derives from *Holmberg v. Armbrecht,* 327 U.S. 392 (1946).

Respondents' argument is two-fold. First, Respondents contend that the Board has not adopted the self-concealing fraud doctrine. Moreover, were such a doctrine applicable, Respondents argue that the Union was clearly aware of sufficient facts to identify a particular cause of action in 1990 and, indeed, filed a timely unfair labor practice charge alleging that the Chico store transaction was a sham. Because the Union knew enough facts to file a charge, Respondents argue that the doctrine of fraudulent concealment is inapplicable, citing *Hobson.*

I agree that the District of Columbia Circuit has recognized two theories of fraudulent concealment in *Hobson.* One method is by affirmative acts of concealment and the other is by a "self-concealing" scheme. However, without deciding whether the Board has adopted the "self-concealing" doctrine in *O'Neill,*[11] I find that the cases dealing with "self-concealing" fraud involve factual patterns in which the party allegedly aggrieved remained totally ignorant of the existence of a potential cause of action through no fault or lack of due diligence on his or her part. When all facts are fraudulently concealed, it is unnecessary to analyze materiality of these facts. However, where as here, only some facts are allegedly concealed but a potential cause of action can be identified, the test enunciated in *Brown & Sharpe II,* discussed below, is applicable. Moreover, contrary to the Respondents' argument that the equitable doctrine of fraudulent concealment should not apply, I find that this doctrine is directly applicable.[12]

[9] *Bailey v. Glover,* 88 U.S. (21 Wall.) 342, 349–350 (1874).

[10] *Brown & Sharpe Mfg. Co.,* 312 NLRB 444 (1993) (*Brown & Sharpe II*), remanded sub nom. *Machinists District Lodge 64 v. NLRB,* 50 F.3d 1088 (D.C. Cir. 1995). The Board has accepted this remand. A prior decision in this case, reported at 299 NLRB 586 (1990) (*Brown & Sharpe I*), was also remanded by the court. *Machinists District Lodge 64 v. NLRB,* 949 F.2d 441 (D.C. Cir. 1991).

[11] See, e.g., *Teamsters Local 170 v. NLRB,* 993 F.2d 990, 998 (1st Cir. 1993), concluding that statements in *O'Neill* discussing "the more relaxed standard of self-concealing wrongs explained in *Hobson,*" were dicta.

[12] Based upon the doctrine in equity of unclean hands, Respondents assert that the Charging Party cannot pursue tolling of the statute of limitations. Respondents' assertion is based on 1989 bargaining in which, according to the Respondents, the Union achieved an advantageous economic agreement by using the North State stores as a bargaining chip. The Respondents argue that the Union, by agreeing to limit the bargaining unit to Morgan's stores and forego inclusion of the North State stores in return for the economic package, only to pursue the North State stores at a later time, is precluded from reliance on an equitable doctrine such as tolling. I find that the evidence, when

B. Fraudulent Concealment

Fraudulent concealment "has three critical requirements: (1) deliberate concealment has occurred; (2) material facts were the object of the concealment; and (3) the injured party was ignorant of these facts without fault or want of due diligence on its part." *Brown & Sharpe II,* 312 NLRB at 444–445. In *Brown & Sharpe II,* the Board explicitly adopted the standard for fraudulent concealment enunciated in *Holmberg v. Armbrecht,* 327 U.S. 392, 397 (1946), as applied in *Fitzgerald v. Seamans,* 553 F.2d 220 (D.C. Cir. 1977). After setting forth this standard, "deliberate concealment of material facts," the Board applied it to the facts in *Brown & Sharpe II* concluding that although the allegedly concealed documents might be relevant to the charge of surface bargaining, the facts did not make a "critical difference" in establishing a violation.

On petition for review, the District of Columbia Circuit faulted the Board for applying a standard of "critical difference," stating that this phrase did not correctly interpret the *Fitzgerald* standard. However, the court opined that an alternative statement in *Brown & Sharpe II* was an accurate statement of the materiality test: "If the absence of [the newly discovered] evidence results in the dismissal or withdrawal of the charge, the subsequent discovery will permit resurrection of the charge." 50 F.3d at 1094. The Board has accepted the court's remand but no decision has issued. The Charging Party urges that a decision herein at this time would be inappropriate due to the uncertainty of controlling authority. Although it is possible that the Board may decide to alter its test for fraudulent concealment in the future, the current state of the law adopts the standard enunciated by the D.C. Circuit. This standard is quite minimal. If I am satisfied that the evidence does not meet even this minimal standard, it would appear that any more stringent standard would also require the same result.

In making this ruling I have viewed the evidence in a light most favorable to the General Counsel and the Charging Party. I have done this for two reasons. First, the general rule in viewing the evidence pursuant to a motion to dismiss at the close of the General Counsel's case is to look at the evidence, together with all reasonable inferences which may be drawn therefrom, in a light most favorable to the General Counsel (the nonmoving party). Secondly,

> Under this test of materiality, the standard is akin to that used when assessing pleadings on a motion to dismiss:
>
> We do not provide for tolling simply because a plaintiff's ability to mount a successful case has been impaired in some degree. Instead, we provide for tolling only when concealment has so impaired the plaintiff's case that he is not able to survive a threshold motion to dismiss for failure to tender a claim that would advance beyond the pleading stage."

Id. 50 F.3d at 1094, quoting 312 NLRB 444, 445 at fn. 25.

Applying this standard, it appears that there are actually two phases of analysis. First, it is necessary to ascertain whether, accepting as true the General Counsel's allegation that the facts were deliberately concealed and could not have been discovered through due diligence, the facts were material under the standard enunciated: the absence of the newly discovered evidence would result in dismissal or withdrawal of the charge.[13] If so, then the analysis proceeds to determine whether the facts were actually deliberately concealed and whether they could have been discovered through due diligence.

1. Materiality of the facts

In order to assess materiality of the facts, the multifaceted alter ego framework must be utilized. The Board determines alter ego status by examination of seven objective factors: whether the two enterprises have substantially identical management; business purpose; operation; equipment; customers; supervision; and ownership. *Advance Electric,* 268 NLRB 1001 (1984); and *Crawford Door Sales Co.,* 226 NLRB 1144 (1976). An additional factor is whether the motivation for the creation of the alleged alter ego was to evade contractual obligations or other obligations under the Act. See *Perma Coatings, Inc.,* 293 NLRB 803, 834 (1989). No one factor is controlling. *Kenmore Contracting Co.,* 289 NLRB 336, 337 (1988); and *Fugazy Continental Corp.,* 265 NLRB 1301, 1301–1302 (1982), enfd. 725 F.2d 1416 (D.C.Cir. 1984). Common ownership is not the sine qua non of alter ego status. *Goldin-Feldman, Inc.,* 295 NLRB 359, fn. 3 (1989); and *Crawford Door Sales, Co.,* supra.[14]

At the time the Union filed its unfair labor practice charge in April 1990, it possessed a great deal of information. For instance, with regard to management, the Union knew that the Chico store, as run by North State, retained two supervisors previously employed by Morgan's. Morgan Sr., through an advisory services agreement, provided his expertise to North State regarding inventory control, purchasing merchandise, pricing, advertising, security, bookkeeping/accounting, and

viewed in a light most favorable to the nonmoving party, does not conclusively support such a factual scenario.

[13] However, "the mere fact that the General Counsel decides to reinstate previously dismissed charges based on allegedly concealed evidence . . . is not dispositive. The threshold of materiality is not that low. Rather, it remains the province of the Board to determine whether the General Counsel's decision to reinstate the charges at issue was reasonable in light of the delineated materiality standard." 50 F.3d at 1094.

[14] In *Gartner-Harf Co.,* 308 NLRB 531 (1992), the Board stated that alter ego status is a subset of single employer status. See also *UA Local 343 v. Nor-Cal Plumbing,* 38 F.3d 1467, 1473 (9th Cir. 1994). This issue is currently before the Board on remand. *Stardyne v. NLRB,* 41 F.3d 141, 153–154 (3d Cir. 1994). It is not necessary to reach this issue herein. Although the consolidated complaint alleges both alter ego and single employer status, the parties have limited their arguments to alter ego theory. However, in the event it were necessary to consider single employer status, pertinent observations will be interspersed throughout the remainder of the decision keeping in mind that the controlling criteria for single employer status are interrelationship of operations, common management, centralized control of labor relations, and common ownership. *Television Artists AFTRA Local 1264 v. Broadcast Service of Mobile,* 380 U.S. 255 (1965) (per curiam). Of these factors, centralized control of labor relations is particularly important. *Richmond Convalescent Hospital,* 313 NLRB 1247, 1249 (1994); see also *Soule Glass & Glazing Co. v. NLRB,* 652 F.2d 1055 (1st Cir. 1981); and *Los Angeles Marine Hardware Co. v. NLRB,* 602 F.2d 1302 (9th Cir. 1979).

developing and revising floor plans. The Union was told that Morgan Jr. was running North State.

The Union also knew that North State and Morgan's had an identical business purpose; i.e., operation of retail grocery stores in Northern California. Both entities utilized the trade name of "Holiday Quality Foods." By visiting the Chico store, the Union learned that operation by North State was identical to operation by Morgan's. Nothing had changed. The signage, store layout, and advertising were identical. The product continued to be supplied from the two entities' common supplier, Provigo, both before and after the change in ownership. Moreover, pursuant to Stemerman's examination of the documents surrounding North State's acquisition of the Chico store from Morgan's, he knew that North State leased the shopping carts, fixtures, and equipment from Morgan's.

Further, the Union knew that the Chico store continued to be located at the same place in the same community. There is no specific evidence about customers but a reasonable inference may be drawn that customers did not change. The Union knew that two of Morgan's supervisors had been retained at the Chico store by North State. There is no specific evidence regarding whether these were the only supervisors. I infer that they most likely had loyal customers. In addition, the Union knew, based on Stemerman's examination of documents, that the Chico store had been acquired by a corporation named North State Grocery, Inc. Stemerman as well as business agents of the Union were told that North State was owned by Morgan Jr. and his sister.

As to the additional factor of intent to evade statutory obligations, the Union knew that Morgan Sr. had stated that he would sell some of his stores in order to meet the economic demands of the Union. The Union also knew that Morgan Sr. had sold some of his stores to Shasta View and some to Bill Hicks. Both of these entities operated the stores nonunion.

It is not my purpose to second-guess the decision of the Region that the above facts were insufficient to support an alter ego finding. To do so would defeat the purposes of Section 10(b). My examination is limited to determining whether absence of the new facts which were discovered, assuming they were deliberately concealed and could not have been discovered through due diligence, resulted in dismissal of the charge. Accordingly, I must assume that the above facts could not have withstood a motion to dismiss.

I do not believe that the absence of the new facts which the Union learned in 1992 resulted in dismissal of the charge in Case 20–CA–23314. Rather, these facts were cumulative of facts already known or represented merely technical details of what was already known.

Ownership: I have found that the Union learned of the existence of the Hooker Creek Irrevocable Trust and its ownership of North State. In other words, Morgan Jr. and his sister are the beneficial owners rather than the outright owners of the corporation. The General Counsel and the Charging Party did not introduce the trust documents in this proceeding. Accordingly, the only evidence before me is the title of this trust. It is an "irrevocable" trust. From this title, I assume that the General Counsel and the Charging Party are correct in their assertion that Morgan Jr. and his sister cannot divest their interest in the corporation for a period of time. There is no evidence as to the identity of the grantor of this trust although Morgan Sr.'s attorney states in a letter Union Counsel Kahn was shown by supplier Provigo that he is the sole trustee and that Morgan Sr. established the trust. This letter was admitted as evidence of what Counsel Kahn discovered during the ERISA/Sec. 301 litigation. This "evidence" of ownership, even assuming the statements in the letter are true, does not assist the Union in defeating a motion to dismiss. Whether the son and daughter were the outright owners or the beneficial owners of the corporation is not material. The fact still remains that Morgan Sr.'s children, both in their mid-twenties at the time, were the owners (beneficial or otherwise) of North State.[15] This was known as early as 1989. There is no evidence that Reese, acting as trustee for North State, carried out his duties in anything other than a fiduciary manner and I cannot draw an inference of unlawful activity on his part. Accordingly, both before and after discovery of the Hooker Creek Irrevocable Trust, the Union knew essentially the same thing. Existence of the Hooker Creek Irrevocable Trust is simply a technical detail of ownership.[16]

Management: The Region knew that Reese served on both Boards of Directors at the time of dismissal of the original unfair labor practice charge. Accordingly, the fact that the Union only ascertained this fact upon receipt of materials from the Region pursuant to a FOIA request cannot serve as an additional fact which must be tested under the "materiality" standard. However, the Union did learn that Morgan Sr. signed an agreement with Provigo to stay involved in management of North State (through the advisory services agreement) and Morgan's for a period of 7 years. The existence of the franchise agreement and the advisory services agreement were known at the time the initial unfair labor practice charge was filed. This explicit agreement to stay involved is merely consistent with Morgan's actions already known to the Union.[17]

Operation: The Union knew that Morgan's and North State utilized the same supplier, Provigo. It knew that Provigo appointed members to Morgan's board of directors during 1986 and 1989 collective bargaining. It knew that Morgan Sr. guar-

[15] I note that common ownership by any family member is sometimes sufficient to establish the requirement of common ownership. See, *Schmitz Food,* 313 NLRB 554, 559 (1993), citing *Gilroy Sheet Metal,* 280 NLRB 1075 fn. 2 (1986), *Campbell-Harris Electric,* 263 NLRB 1143 (1983), enfd. 719 F.2d 292 (8th Cir. 1983); *Bryar Construction Co.,* 240 NLRB 102, 104 (1979); and *M.P. Bldg. Corp.,* 165 NLRB 829, 831 (1967), enfd. 411 F.2d 567 (5th Cir. 1969). However, the Board has also held that family relationship does not result in an alter ego finding absent other indicia of alter ego status. See, *Victor Valley Heating & Air Conditioning,* 267 NLRB 1292 (1983); *First Class Maintenance Service,* 289 NLRB 484 (1988); and *Friederich Truck Service,* 259 NLRB 1294 (1982). Further, common ownership is not a necessary element of alter ego status in some circumstances. See, e.g., *Bryar Construction Co.,* 240 NLRB 102, 104 (1979).

[16] Similarly, absence of the evidence as to the single employer criterion, common ownership, would not have resulted in dismissal of the charge as the ownership information discovered in 1992 was either cumulative or technical in nature.

[17] The same result would occur if the single employer criterion, common management, were utilized.

anteed loans from Provigo to North State. Through post-dismissal discovery, the Union learned additionally that Morgan Sr. guaranteed not only North State's operating loans but the actual start-up loan from Provigo. It learned that one loan request to Provigo was submitted jointly from Morgan's and North State. It also learned that shares of North State were assigned by Reese to Provigo. I do not view these additional facts as anything other than cumulative of what the Union already knew when it filed the original charge.[18]

Motivation: Finally, the Union learned that in support of a March 31, 1991 loan application, North State submitted a 1991–1995 mission and goal statement which indicated that among other acquisitions, new construction projects, and capital improvements, North State wanted to acquire further Morgan's stores. Considering that at the time of the original unfair labor practice charge, North State had already acquired two of Morgan's stores, the existence of a plan for further acquisition is hardly surprising. Rather, such a plan is merely consistent with actions clearly known by the Union. More importantly, the fact of such a plan does not support the Union's contention that Morgan Sr. was controlling North State. Accordingly, I conclude that the absence of this evidence would not have resulted in dismissal of the charge.

Taking all of the additional facts as a whole or individually, their absence would not have resulted in dismissal of the charge. Accordingly, I am unable to conclude that these facts are "material" under the standard adopted by the Board in *Brown & Sharpe II.*[19] Although it is unnecessary to proceed any further in the analysis, I have also considered the issues of deliberate concealment and due diligence.

2. Deliberate concealment

Mere silence where there is no duty to speak does not rise to the level of deliberate concealment. Here, however, Respondent Morgan's was under a statutory duty to supply relevant information to the bargaining agent of the employees. Prior to filing the timely unfair labor practice charge on April 25, 1990, Reese told Stemerman in January 1990 that the true owners of North State were the son and daughter of Morgan Sr. He did not mention the Hooker Creek Irrevocable Trust. At a grievance meeting in 1989, representative Boehme asked Floyd Morgan about the sale of stores under union contract to which Floyd Morgan replied that the stores were sold to North State which was owned by either Morgan Sr.'s son or his son and daughter. Similar statements were attributed to Floyd Morgan by Local 588 Secretary/Treasurer Reginato. Accordingly, I find that the existence of the Hooker Creek Irrevocable Trust was affirmatively concealed. See, e.g., *Girardi Distributors,* 307 NLRB 1497, 1512–1513 (1992), enfd. in relevant part sub nom. *Teamsters Local 170 v. NLRB,* supra (there must be an affirmative misrepresentation concerning material facts); *O'Neill, Ltd.,* 288 NLRB 1354, 1355 (1988) (misrepresentation made that employer was going out of business and never returning, had no interest in Fresno Beef Processor when in fact owned it, and had not leased plant when in fact it had, constituted part of elaborate scheme to evade contractual obligation); and *Strawsine Mfg. Co.,* 280 NLRB 553 (1986) (misrepresentation of plans to close one facility and concealing plans to relocate).

3. Due diligence

Due diligence does not require litigation in order to procure court-ordered discovery of concealed facts. *Baskin v. Hawley,* 807 F.2d 1120, 1130–1131 (2d Cir. 1986). Here the Union repeatedly requested information about the ownership of North State. Although a statutory duty to divulge such information existed, the true identity of the owner was not forthcoming. Were I to reach the issues of due diligence at this juncture, viewing the evidence in a light most favorable to the General Counsel, I would find that the Union satisfied the due diligence requirement. See *Garrett Railroad Car,* 289 NLRB 158 (1988); cf. *Moeller Bros. Body Shop,* 306 NLRB 191, 192 (1992) (union's failure to exercise due diligence in discerning whether employer paid contractual wage rates and fringe benefits limited remedial relief to 10(b) period where union failed to appoint a job steward, rarely visited the shop, and never took any measures to enforce the union security provisions of the contract).

CONCLUSION OF LAW

Prosecution of the consolidated complaint against alleged alter egos Morgan's Holiday Markets, Inc. and North State Grocery, Inc. is barred by Section 10(b) of the Act.

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended[20]

ORDER

The consolidated complaint in Cases 20–CA–23314 and 20–CA–25025 is dismissed.

[18] The same result would be reached if the single employer indicium, interrelationship of operations, were utilized. I also note that the fourth criterion for single employer, centralized control of labor relations, lacked evidence both before and after discovery of the allegedly concealed evidence.

[19] The tests for alter ego and single employer are multifaceted. No one factor is controlling under either analysis. However, I note that both before and after discovery of allegedly concealed facts, the evidence failed to indicate substantially identical supervision (alter ego factor) or centralized control of labor relations (single employer factor). See, e.g., *J. M. Tanaka Construction v. NLRB*, 675 F.2d 1029 (9th Cir. 1982), enf. 249 NLRB 238 (1980) (most important single factor is centralized control of labor relations); and *Haley & Haley v. NLRB*, 880 F.2d 1147 (9th Cir. 1989) (reiterating test articulated in *J. M. Tanaka*).

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.